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Nos. 778, 779, 830, 831, 832, 833, 834, 835, and 836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
NORFOLK AND WESTERN RAILWAY COMPANY,
OSCAR GRUSS & SON,
NEW YORK, NEW HAVEN AND HARTFORD R.R. CO. FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
ERIE-LACKAWANNA RAILROAD COMPANY, *et al.*,
BOSTON AND MAINE CORPORATION,
READING COMPANY,
CITY OF SCRANTON, *et al.*,
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE DELAWARE AND HUDSON RAILROAD CORPORATION TO AFFIRM

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November 27, 1967

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The Delaware and Hudson Railroad Corporation (D&H), appellee in Nos. 778, 779, 830, 831, 833, 834, 835 and 836, moves, in response to the Jurisdictional Statements filed therein, to affirm paragraph (3) of the judgment below, and in support thereof respectfully states the following:

PRELIMINARY STATEMENT

These appeals challenge in one or more aspects the judgment of a unanimous three-judge court in the Southern District of New York dismissing on the merits complaints

attacking the validity of decisions of the Interstate Commerce Commission (the Commission) (1) authorizing immediate consummation of the merger of The Pennsylvania Railroad Company (Penn) and The New York Central Railroad Company (Central) subject to specified terms and conditions, and (2) directing Norfolk and Western Railway Company (N&W) to include in its system D&H, Erie-Lackawanna Railroad Company (EL) and Boston and Maine Corporation (B&M) on specified terms and conditions. The first case is referred to as the Penn-Central *Merger* case and the second as the N&W *Inclusion* case. These appeals, together with No. 832 in which EL and D&H are appellants on a conditional basis for the reasons stated in the Jurisdictional Statement therein, have been consolidated by order of this Court dated November 9, 1967.

On March 27 of this year, this Court held that prior orders of the Commission authorizing immediate consummation of the Penn-Central merger were patently invalid because the Commission had removed certain provisions of the "Appendix G" protection provided for D&H, EL and B&M which were a necessary prerequisite to the merger. *Baltimore & O. R. Co.* v. *United States*, 386 U. S. 372. The Court further held that consummation of the Penn-Central merger should be deferred until the future of D&H, EL and B&M and their inclusion in a major system had been decided, referring to the N&W *Inclusion* case which was then pending before the Commission as possibly dispositive of this matter. The Commission has since provided for such inclusion in the N&W system* (330 I.C.C. 780, modified on

* Pursuant to the conditions of Appendix O in the earlier report of the Commission in the N&W-Nickel Plate case, *Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 148 (1964), which conditions were established under the authority of Section 5(2)(d) of the Interstate Commerce Act, 49 U. S. C. §5(2)(d).

reconsideration, 331 I.C.C. 22) and its modified order has been upheld by the judgment which is here appealed from by N&W in No. 779, and by other parties in other appeals.* Since this Court's decision the Commission has also modified the Appendix G conditions in the Penn-Central *Merger* case and again authorized immediate consummation of that merger (330 I.C.C. 328). That order has also been upheld by the judgment which is here appealed from by N&W and its allies in No. 778, and by other parties in other appeals.**

D&H is concerned herein principally with the appeal of N&W in No. 779 relating to the N&W *Inclusion* case, although brief comment will also be made as to the other appeals. Paragraph (3) of the judgment below dismisses all complaints relating to the *Inclusion* case and D&H herein moves to affirm the same. If paragraph (3) is affirmed, D&H has no objection to affirmance of the lower court's judgment as it relates to the *Merger* case. If paragraph (3) is not affirmed on N&W's appeal in No. 779, then D&H, an appellant in No. 832, seeks remand of the *Merger* case on the grounds set forth in the Jurisdictional Statement in No. 832.***

N&W's Jurisdictional Statement in the *Inclusion* case lists seven questions presented. However, in discussing the alleged substantiality of these questions, N&W in fact confines itself to two issues. We will therefore here deal with these two issues, leaving our answer as to other matters to the brief of D&H of September 25, 1967 filed below in the *Inclusion* case, 67 Civ. 2451, and the opinion of the District Court.

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* Nos. 833 and 836.

** Nos. 830, 831, 834 and 835.

*** See also D&H's Motion to Consolidate, etc. filed herein November 6, 1967, pp. 6-8.

ARGUMENT

I. Concerning N&W's Appeal in the N&W Inclusion Case

A. The Commission Has Found, and Properly Found, That the Public Interest Would Be Served by Directing N&W to Acquire EL, D&H and B&M on the Terms Established

N&W seeks to impart an appearance of public interest to its position in the *Inclusion* case by charging (J. S. p. 10)* that "The Commission has not found that any public interest would be served by directing N&W to acquire the stock of deficit railroads." Thus N&W assumes a Commission finding, or that the evidence necessitates a finding, that D&H, EL and B&M would be "deficit railroads" when included in the N&W system.** As we shall show, this is clearly an erroneous assumption.

In fact, N&W's attack on the public interest aspect of the *Inclusion* case is spurious in the extreme. The Commission has been faced in a number of cases with the growing need for railroad consolidation in the East (330 I.C.C. at 784-89). Its provision for inclusion of EL, D&H and B&M in the N&W system stems from the Commission's findings, on the one hand, that a Penn-Central merger would provide vast benefits to the public at large in improved service, and the desirability, on the other hand, of preserving rail

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* Unless otherwise indicated, "J. S." refers to the Jurisdictional Statement in No. 779. All references to evidence, briefs and the like, unless otherwise indicated, are to the *Inclusion* case, either before the Commission or the District Court as will appear from the context. The opinion of the District Court is printed as Appendix B to the Jurisdictional Statements in both No. 778 and No. 779.

** N&W admits that after inclusion D&H would have substantial earning power but lumps D&H with EL and B&M in its claim that the three "collectively" would be deficit roads (J. S. p. 12).

competition in the territory that would be served by a Penn-Central system. Thus the Commission has concluded that EL, D&H and B&M, which would provide the only substantial competition with Penn-Central in the area east of Buffalo, but which it found unlikely to survive the competition of a Penn-Central combine as independent carriers (*Merger* case, 327 I.C.C. at 532), should be included in another system. It was logical to conclude that such other system should be N&W, which today has no lines east of Buffalo and which, after the inclusions, would thus be extended to the New York City area, northern New York and Montreal and into New England in direct competition with the lines of Penn-Central (330 I.C.C. at 792). The Commission recognized the responsibility of N&W to include these three roads when in 1964 it approved N&W's merger with the Nickel Plate and related acquisitions subject to a condition looking to such inclusion if Penn-Central should later be approved (324 I.C.C. at 30-32); and the Commission was clearly justified in insisting in the instant proceeding upon acceptance of this responsibility by N&W which had shown it could achieve annually $29,000,000 of savings in costs of operations through its 1964 unification with Nickel Plate and other roads (330 I.C.C. at 801). Further, it was this very N&W-Nickel Plate unification, along with that of Chesapeake & Ohio and Baltimore & Ohio, which gave impetus to the Penn-Central merger (*Merger* case, 327 I.C.C. at 519) which in turn created the necessity for making satisfactory provision for EL, D&H and B&M. The Commission has properly construed the Interstate Commerce Act as requiring strong roads to take care of weaker roads in consolidations that have territory-wide repercussions (330 I.C.C. at 789).

Moreover, the Commission has specifically found that "the normal earnings of each petitioner [EL, D&H and B&M] after inclusion will be sufficient to meet their fixed charges" (330 I.C.C. at 795). That recent earnings of the carriers as independent roads, to which N&W refers (J. S. p. 6), have not been as high as the Commission has found they would normally be after inclusion in no way detracts from this basic finding of the Commission. Far from merely "assuming", as N&W asserts (J. S. p. 14), that their inclusion in N&W would provide earning power for each of the three included roads as subsidiaries of N&W at least sufficient to meet its fixed charges, the Commission has detailed at length the reasons why it has arrived at this finding (330 I.C.C. at 794-95, 803-09, 813-18 (as modified by 331 I.C.C. at 28-31), 820-21).

Thus it cannot be denied that the Commission has found after weighing the evidence that none of the three petitioners would be a deficit railroad when included in the N&W system. And this finding has been reviewed in detail and upheld by the District Court as a rational finding supported by substantial evidence in every aspect challenged by N&W (J. S. B-33-61). The fact that the District Court considered N&W's contentions in the context of the issue as to fair terms rather than as a challenge by N&W on the issue of public interest in no way lessens the force of that Court's conclusion (e.g., J. S. B-40-42, 49) that the Commission's findings as to normal earnings are supported by substantial evidence. Rather, the Court's treatment of the matter is a proper recognition of the palpable fact that N&W's stated concern as to the public interest in being required to include the three roads has been merely a cover for its strenuous efforts to cut the price it should be required to pay for the petitioners.

Furthermore, even if the Commission had not found that normal earnings of each petitioner would be sufficient to meet its fixed charges, or, even if its finding as to normal earnings after inclusion lacked substantial evidentiary basis, N&W's argument would be without merit. N&W contends (J. S. p. 12) that unless each petitioner has sufficient earnings to make it a "viable" subsidiary of N&W, inclusion would not preserve its service. This contention overlooks the fact that the benefit to N&W itself of such inclusion may be sufficient to assure that N&W will preserve the service performed by wholly-owned or virtually wholly-owned subsidiaries* even if the individual earnings of one or more of them is a red figure. The advantages of protecting N&W's own traffic and revenues against the inroads of a Penn-Central system, to which the Commission has pointed (330 I.C.C. at 804-08), and the assistance of the petitioners to N&W in developing new business in competition with Penn-Central and other modes of transport, which the Commission has particularly stressed (*id.*), are sufficient to justify the conclusion that when included in the N&W system, continuance of the service of the petitioners will be assured. Likewise, the very substantial tax benefits to N&W of including EL, which N&W concedes (J. S. p. 11), furnish a further basis for the conclusion that N&W will keep EL as a subsidiary and preserve its service

*For five years, or possibly less, the subsidiaries will be over 80% owned by N&W (with its attendant consolidated return tax benefits), and thereafter they will be 100%-owned by N&W (331 I.C.C. at 44-45). The subsidiaries permitted to go into bankruptcy which are cited by N&W (J. S. p. 12, n. 5) were railroads of which a bare majority of the stock was owned, i.e., 56% in *Erie R. Co. Reorganization*, 239 I.C.C. 653, 655 (1940), and 51% (including indirect holdings) in the case of Central Railroad Company of New Jersey (see *Chesapeake & O. Ry. Co.—Control—Western Maryland Ry. Co.*, 328 I.C.C. 684, 707-08 (1967)).

even if that subsidiary could not stand entirely on its own earnings.

In this connection there should be noted the evidence N&W itself offered to the Commission in the *Inclusion* case in support of its much touted N&W-C&O-Dereco "alternative." Such evidence (stricken by the hearing officer) was tendered to show that the large combination of N&W-C&O-Dereco would have greater *combined* traffic strength to compete with Penn-Central and greater *aggregate* savings in the cost of operation than an N&W system expanded to include merely the petitioners (e.g., Exs. N&W-4, pp. 61-65, N&W-8, pp. 18-23); but there was *no* evidence offered to show that each individual Dereco line* would have, to use N&W's words, "sufficient earnings to make it a viable subsidiary of N&W" (J. S. p. 12). Clearly the assurance of continuation of the subsidiaries as parts of the N&W system depends, as N&W recognized in its evidence, not merely on each subsidiary's earnings, or their combined earnings, but upon the *worth* of those subsidiaries to the system as a whole.

Here the Commission has not only found the worth of the petitioners on inclusion to be substantial in respect of increased competitive strength, protection against traffic losses to Penn-Central and tax benefits, but it has also found, after analysis in depth, that the normal earnings of each individual petitioner as a subsidiary of N&W would in fact be sufficient to cover its own fixed charges. The Commission has correctly concluded that there would be practical assurance of preservation of the service and competition of the three petitioning roads, after consummation of Penn-Central, if they are wholly-owned subsidiaries of N&W. The finding of the Commission that inclusion would

* N&W proposes merger of C&O with itself but each of the "Dereco" lines—D&H, EL, B&M, Reading and Central Railroad of New Jersey—would be operated as a separate subsidiary.

be consistent with the public interest is sound and N&W's attack thereon is totally lacking in substance.

B. The Commission Has Made Findings, Based on Substantial Evidence, Which Support Inclusion of D&H Without B&M on the Terms Established

N&W errs in asserting (J. S. p. 14) that the Commission's order assumes inclusion of all three petitioners.

The Commission has provided (331 I.C.C. at 43-47) that EL is to be included in the N&W system on the terms it has fixed whether or not D&H and B&M are included; and while it has provided that D&H cannot be included unless EL is included, it has also provided for D&H inclusion on the terms fixed whether or not B&M is included. The Commission expressly disavowed N&W's argument that the "inclusion of all three petitioners explicitly premises our decision herein" (*id.* at 41). Thus the Commission's order necessarily includes a finding, as the District Court said (J. S. B-59, n. 38, B-61), that the possible non-inclusion of B&M would not affect the terms for either EL or D&H; and the same is true as to the terms for EL if D&H is not included. We shall here concern ourselves with respect to N&W's contention only as it attacks the terms for D&H inclusion, assuming that EL will deal in its argument with N&W's contention as it relates to EL's terms.

It is clear that there are two reasons why the terms which have been established for D&H inclusion do not vary, depending on whether B&M is or is not included. One is that the evidence on the basic issue here involved supports the fairness to N&W of the prescribed terms even if B&M is not included. The second is that the Commission has conservatively required in addition significant "cushions" in the price established in order to protect the investment of N&W (330 I.C.C. at 801).

The basic issue as to the price which N&W should be required to pay for each petitioner concerns changes in the routing by shippers of freight traffic which may be reasonably anticipated as a result of inclusion of the petitioners in the N&W system, on the one hand, and the consummation of the Penn-Central merger, on the other. Obviously this is a matter peculiarly within the expertise of the regulatory agency.

The Commission has found (330 I.C.C. at 804-08) and the District Court has upheld its findings (J. S. B-42-49) in two major respects: (1) that inclusion of petitioners in the N&W system would increase freight revenues for petitioners on existing traffic of petitioners and N&W through solicitation for the long haul over the unified N&W system; and (2) that while petitioners would also suffer substantial losses of their existing traffic to a Penn-Central system, such losses would be fully offset by a combination of three elements, namely, (a) additional freight revenues for N&W itself on the existing traffic of petitioners obtained through routings thereof over the longer hauls of the thus-expanded N&W system, (b) protection to a substantial degree of N&W's existing traffic from loss thereof to Penn-Central, and (c), what the Commission regards as perhaps the most important of all, gains for N&W of *new* traffic, at the expense of Penn-Central or competing modes of transport, which inclusion of petitioners would permit through the expansion of the present N&W system and its increased competitive strength.

The evidence of record before the Commission as to these factors consists not only of evidence on the assumption of the inclusion of all three petitioners but also evidence on the assumption of the inclusion of less than all. Thus there

is evidence as to significant traffic gains for each of the components of an N&W-EL-D&H combination as a result of D&H inclusion, whether or not B&M is included.* There is furthermore shown to be substantial traffic protection against losses of N&W's existing traffic as a result of D&H inclusion, whether or not B&M is included. And, of course, the addition of D&H to an N&W-EL system (without B&M) would provide added competitive strength for obtaining new business, bringing such a system not only to the area served directly by D&H but also to the gateways to central and northern New England and eastern Canada (330 I.C.C. at 793-94). Significantly, by reason of the physical relationships of the roads involved (*id.*), new business which inclusion of D&H would generate would redound not only to the benefit of the present N&W but also in large part to its EL subsidiary, 93% of the stock of which the present N&W stockholders would own after EL's inclusion. The evidence is summarized in D&H's brief to the District Court dated September 25, 1967, pages 17-19.

Furthermore, on top of these offsets to losses of traffic to Penn-Central, there are "cushions" to protect N&W's investment if it acquires D&H (in addition to EL) without also acquiring B&M, notably substantial savings in operating costs not credited to D&H in the Commission's cal-

* It is to be noted that, at N&W's request (331 I.C.C. at 26), N&W is entitled to acquire D&H for cash, rather than for N&W common stock. Under the cash alternative D&H is given no credit in the calculation of the price for increases in D&H's own traffic (*id.* at 29-31). Also, as referred to in the following footnote, the price under the stock alternative likewise stands without any credit to D&H for increases in its own traffic. Thus all traffic gains to each of the components of an N&W-EL-D&H combination resulting from D&H inclusion must be taken into account in determining whether the losses of D&H traffic to a Penn-Central system would be offset after inclusion.

culation of the cash price N&W is required to pay for D&H,* and credit to N&W against the purchase price for a large portion of the income tax benefits which the law provides for D&H upon the sale of its assets to N&W at the loss resulting from the terms fixed by the Commission. See D&H's brief to the District Court dated September 25, 1967, page 19.

In this connection, N&W's criticism (J. S. pp. 23-24) of the District Court's treatment (J. S. B-60-61) of the savings in operating costs in apposition to losses of D&H traffic to Penn-Central if B&M is not included is obviously unjustified. The District Court had already noted (J. S. B-42-49) that the Commission had rationally concluded from the evidence that traffic gains after inclusion as well as protection of N&W traffic losses to Penn-Central would more than offset losses to Penn-Central if all petitioners were included. The Court had further noted (J. S. B-58-59) that although N&W, as custodian of the figures and knowledge, had the burden of presenting evidence that would permit a judgment as to the extent to which inclusion of

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* While the Commission has purported to credit D&H with 100% of the savings in operating costs and D&H traffic gains in its calculation of the price if N&W chooses to acquire D&H for N&W common stock, the dollar amount of such savings and gains required to support the price on the stock alternative ($339,000) is actually somewhat less than the $362,000 of savings (after income taxes) wholly apart from any traffic gains (see 331 I.C.C. at 33 and D&H's brief to the District Court, Sept. 25, 1967, p. 7, first footnote). Thus, even if it is considered that the gains in D&H's own traffic (as well as traffic gains for N&W and EL and protection against N&W traffic losses) must be taken into account in order fully to offset maximum D&H traffic losses to Penn-Central if B&M is not included, there remains on the stock alternative a small "cushion" in the savings. As indicated above, on the cash alternative, which N&W has insisted upon, the full amount of the savings constitutes a "cushion".

less than all petitioners would protect N&W against loss of its own traffic to Penn-Central, N&W had failed to do so; and the Court had already also pointed out (J. S. B-59) that in the absence of contrary evidence, the Commission was justified in concluding from the evidence before it that the losses of traffic of D&H and EL would not be a great deal larger if B&M were not included in N&W, but remained an independent carrier, than the losses would be if B&M were also included.

Thus when it said that the net effect of possible additional losses of D&H traffic if B&M is not included would be offset by the net effect of savings from control of D&H, the District Court was not giving, or implying that the Commission was giving, "credit" to D&H for the savings in the calculation of the cash price in conflict with the Commission's decision (331 I.C.C. at 29-31) not to give D&H such "credit". Rather, the Court was merely pointing out, as it said, that there were "still further considerations" supporting the Commission's action as to D&H, i.e., that this one "cushion" alone was sufficiently large to offset even the maximum of such additional losses in the event the Commission's conclusion as to traffic offsets should prove to be too optimistic. But, as the evidence of record shows (D&H brief below, pp. 17-19), the offset exists apart from this "cushion", and thus the "cushion", as the word implies, serves merely to confirm the fairness to N&W and the conservatism of the price established for D&H even if B&M if not included.*

*N&W attacks (J. S. pp. 23-24) the District Court's statement as to the $565,000 of control savings in three respects, the third of which is dealt with in the text hereof. As to the others, it is obvious that the Court was not disagreeing with the Commission as to the amount of the savings but was merely, and correctly,

It was, of course, highly desirable that the Commission establish one price for inclusion of each petitioner whether or not all were included. The Court below noted (J. S. B-61) that "it would have been wholly impracticable for the Commission to ask E-L and D&H to go to their stockholders with purchase prices sliding downward in the event of adverse action by stockholders of other roads." As the Court then added:

> "The Commission exercised the best over-all judgment it thought possible under the circumstances, and its valuation for E-L and D&H must be taken to have encompassed the possibility that all three roads might not enter their new home."

In sum, the evidence clearly supports the fairness to N&W of the terms for including D&H prescribed by the Commission even if B&M rejects the terms for its inclusion and B&M therefore chooses to remain an independent carrier for some indefinite period of time.

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noting the conservatism of the amount of savings estimated to be achievable if D&H is acquired by N&W. See J. S. B-54-55; see also Commissioner Webb's Recommended Report, pp. 129-30, indicating that even if EL is not merged, D&H can be merged into N&W, and that if this were done, N&W admits it could achieve over $3 million of savings a year in addition to the $565,000 of savings achievable if D&H were operated as a subsidiary. The full Commission's conclusion that merger now is "nowhere in sight" does not detract from the fact that the amount of savings used by the Commission is now and will prove ultimately to be on the low side. In view of N&W's questioning of virtually every other figure in the record, its unhesitating acceptance from the beginning of this proceeding of $565,000 as the amount of savings achievable on acquisition of control of D&H (see Ex. N&W-7, p. 8, App. 3, sh. 2, item 11) is itself a guarantee that the figure is conservative. See also the Jurisdictional Statement in No. 833, where B&M shows in detail the conservatism of the savings from control of subsidiaries relied on by the Commission.

Essentially N&W's position as to the effects of non-inclusion of B&M rests on N&W's assumption that if B&M stockholders reject the terms for inclusion in N&W, B&M will immediately seek to become, and will succeed in becoming, a part of the Penn-Central system (J. S. pp. 19-21). The facts do not bear this out.

While B&M has been classed by the Commission along with D&H and EL as in need of inclusion in a major system if the Penn-Central merger is consummated (*Merger* case, 327 I.C.C. at 532), B&M (a) has since advised the lower court that the adverse effects on B&M of that merger would be "undoubtedly less" than the adverse effects on EL and D&H (transcript of oral argument on previous review in the *Merger* case, Sept. 21, 1966, p. 63), (b) refrained last year from seeking in this Court a deferral of the Penn-Central merger even when the Commission had not provided for revenue indemnity protection for B&M, and now affirmatively supports consummation of the Penn-Central merger prior to assurance of inclusion in N&W or any other system (J. S. No. 833, p. 20), and (c) seeks denial of its own petition for inclusion in N&W if the terms fixed therefor by the Commission are not substantially improved (*id.* at 19) while aware of the Commission's firm conviction that from the standpoint of the public interest B&M's inclusion in N&W, along with that of EL and D&H, is preferable to inclusion in Penn-Central (330 I.C.C. at 796).

It seems to follow from the foregoing that B&M will not necessarily seek immediate inclusion in Penn-Central if its stockholders reject inclusion in N&W on the present terms. Rather, it appears clear that B&M believes that a Penn-Central merger will not impede B&M's ability to survive

as an independent carrier for a reasonable period of time;* and B&M evidently hopes that during the interval before its own inclusion in a large system becomes necessary, N&W's obdurate opposition to inclusion of B&M in the N&W system on terms that may be acceptable to B&M's stockholders will fade once N&W is forced to compete with a consummated Penn-Central system. See the September 14, 1967 affidavit (p. 3) filed below in the Penn-Central *Merger* case, 66 Civ. 2860, by Richard J. Mulhern, B&M's President.

Furthermore, while B&M might try to become part of Penn-Central if B&M stockholders reject the N&W inclusion terms, B&M would not only have major hurdles to surmount in order to achieve this goal but N&W could by appropriate action secure adequate protection for its investment in D&H if B&M should make this attempt. The Commission has already provided that in the event B&M stockholders reject inclusion in N&W, B&M will have no right to compel inclusion in Penn-Central (331 I.C.C. at 44). With EL and D&H in the N&W system it would seem doubtful that Penn-Central would be willing voluntarily to agree upon terms for inclusion of B&M in the Penn-Central system that B&M stockholders would find any more acceptable than the terms for B&M's inclusion in N&W. For, even if Penn-Central did, there would be no assurance that the Commission would approve an application by Penn-Central to acquire B&M if EL and D&H were al-

* B&M's position is thus to be contrasted with that of D&H which, as shown in its briefs filed with this Court last year in *Baltimore & O. R. Co.* v. *United States, supra,* is concerned with the possibility of heavy losses of its traffic to Penn-Central promptly after consummation of Penn-Central if D&H remains an independent carrier.

ready in the N&W system since the Commission is firmly convinced that the inclusion of all three in N&W is preferable to their inclusion in Penn-Central.* There is consequently good reason to believe that if N&W then filed an application to acquire control of B&M, it would be approved by the Commission, even on terms below Penn-Central's price. And finally, it is to be noted, N&W has advised the Commission that so far as its own "private" interests are concerned, it would just as soon see both B&M and D&H in the Penn-Central system (oral argument before the Commission, Tr. 3897-98).** Therefore, in the unlikely event of a Commission disposition to approve a Penn-Central-B&M combine following inclusion of EL and D&H in the N&W system, it would seem probable that at N&W's request the Commission would require as a condition thereto Penn-Central's acquisition also from N&W of the D&H properties***—and, if N&W is right in saying (N&W Exceptions to Recommended Report, pp. 5-6) that D&H is worth more to Penn-Central than to N&W, this would, moreover, be at a profit to N&W. Clearly, therefore, N&W's investment in D&H on the present terms can be fully protected even if B&M and Penn-Central should seek to combine, assuming a rejection by B&M of the terms for B&M's inclusion in N&W now established.

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* See also Mr. Justice Brennan's concurring opinion in *Baltimore & O. R. Co.* v. *United States, supra,* 386 U. S. at 408-09.

** N&W's statement (J. S. No. 778, p. 25) that "Plainly, the inclusion of B&M, or both D&H and B&M, in Penn-Central would be harmful to every other railroad operating in the East" is thus misleading.

*** D&H agrees that when B&M is in fact included in any of the major systems under discussion, the D&H and B&M properties should be in the same system.

In view of the foregoing, it is evident that N&W's reliance on *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947), and *Labor Board* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965), is misplaced. The District Court was correct in stating, as above pointed out, that the Commission's ultimate conclusion as to the value of D&H clearly encompasses the possibility that B&M might not be included. As the District Court pointed out, the *Chenery* case does not require the agency and the courts to play "a nigh endless game of battledore and shuttlecock with respect to subsidiary findings." While the Commission did not *in haec verba* state that it found that the price for D&H should not vary depending on B&M's actual inclusion, it is clear that the Commission directly focused on the problem and determined that no difference in the price should be established. For the Commission fixed a value for D&H on inclusion in the N&W system with express awareness of the fact that B&M might not actually be included, and without making D&H inclusion dependent on B&M's inclusion although it expressly made B&M's inclusion dependent on that of D&H and the inclusion of both dependent on EL's inclusion; and the evidence fully supports such value as fair to N&W on the Commission's principles of valuation, whether or not B&M is included.

II. Concerning Appeals of Parties Other Than N&W in the N&W Inclusion Case

The Jurisdictional Statement of the EL bondholder appellants in No. 836 seeks remand only for what they contend is a necessary clarification which would not delay the inclusion of EL (on whose inclusion D&H inclusion in N&W is dependent) on the presently established terms. Assuming that such a remand would not delay EL's and

D&H's right to proceed to enforcement of the Commission's provision for their inclusion in N&W in its order in 330 I.C.C. 780, as modified, 331 I.C.C. 22, D&H takes no position as to the merits of the EL bondholders' appeal.

B&M in No. 833 seeks a remand either to consider evidence which may produce terms more favorable to B&M or, alternatively, to deny B&M's petition for inclusion in N&W. Since the Commission has found that D&H's inclusion in N&W on the terms prescribed for D&H is not dependent on B&M's inclusion, any remand based on either prong of B&M's appeal should also be without prejudice to the right of EL and D&H to proceed to enforcement of the Commission's provision for their inclusion in N&W in its order in 330 I.C.C. 780, as modified, 331 I.C.C. 22.

III. Concerning the Penn-Central Merger Case

For the reasons stated in the Jurisdictional Statement of EL and D&H in No. 832, appeals in the *Inclusion* case necessitate the deferral of consummation of Penn-Central until there is a final decision providing for D&H inclusion in N&W (or failing that, some other major system).

Further, for the reasons also stated in said Jurisdictional Statement, if this Court remands the *Inclusion* case on any ground relating to the consequences of a Penn-Central merger on the traffic of D&H or of EL, on whose inclusion in N&W, D&H inclusion is dependent, this Court should also remand the Penn-Central *Merger* case. Remand of the *Merger* case should be required under such circumstances because of the Commission's failure to retain jurisdiction to impose on the Penn-Central system a condition requiring that system to indemnify D&H or EL or both for capital loss in the event the Commission provides for inclusion in the N&W system on terms reflecting, because of

the traffic consequences of a Penn-Central merger, a downward adjustment in the price N&W would otherwise be required to pay.

The appeal of D&H and EL will become moot if the judgment below in the *Inclusion* case and as to the lawfulness of the Appendix G conditions in the *Merger* case is affirmed.

The Jurisdictional Statement of N&W and its allies (hereinafter collectively referred to as N&W) in No. 778 concerning the judgment as to the *Merger* case, to the extent N&W therein assumes affirmance of the *Inclusion* case, rests principally on one argument. N&W contends that the Appendix G conditions for the protection of EL, D&H and B&M pending inclusion may be of indefinite or even permanent duration because of the likelihood, as N&W sees it, of B&M's rejection of terms for inclusion in N&W and the possibility of D&H's rejection of N&W inclusion terms; and N&W says (J. S. No. 778, p. 16) that the Commission, expecting the three roads to become N&W affiliates, has not dealt with the possibility that a protected road might not become an N&W affiliate, might reject the inclusion order, or that Appendix G might have to be in effect "for a period far beyond the short interim that would have been necessary to handle the mechanics of inclusion."

N&W's charge that the Commission has not considered these matters is baseless. Its definition in the *Merger* case of the "protective period" for which Appendix G is to endure (330 I.C.C. at 362) explicitly contemplates rejection of the inclusion terms and provides for re-assessment of the matter of duration of protection if they are not accepted and the inclusion accomplished within one year after a final determination upholding the inclusion terms—the pos-

sibility of which is expressly recognized not only as to B&M and D&H, but also EL, in its simultaneous decision in the *Inclusion* case (330 I.C.C. at 868-69). The Commission furthermore has provided in its decision in the *Merger* case (330 I.C.C. at 355) for revocation in whole or in part of the Appendix G protection should it appear that the protected roads, because they cease to "expect to become affiliates of N&W" or for any other reason, endeavor to divert traffic from N&W to Penn-Central. The Commission also noted in this connection that if any protected road thus sought to divert traffic, it would assume the risk of retaliation from N&W.

The remainder of N&W's attack on the lawfulness of the Appendix G conditions is a repetition of its argument made below and should be rejected on the opinion of the District Court.*

Since the Jurisdictional Statement in Reading Company's appeal, No. 834, seeks only protection for Reading, stating (p. 4) that the relief sought "will not result in injustice to Penn-Central or to the other small railroads involved since Reading is not now seeking to have the merger postponed", D&H takes no position on the merits of Reading's appeal.

The appeal of the City of Scranton and Shapp, No. 835, should be dismissed as clearly lacking in substantiality and no further discussion thereof is here required.

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*As set forth in D&H's Motion to Consolidate, etc. herein of November 6, 1967, page 5, footnote, while Appendix G is lawful it would be inherently less protective of D&H against the adverse effects of Penn-Central than D&H inclusion.

D&H was not a party to the action of Oscar Gruss & Son or New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (whose complaints are discussed in the opinion below at B-22-30), and therefore takes no position with respect to their appeals, Nos. 830 and 831.

CONCLUSION

The judgment below as to the *Inclusion* case should be affirmed. If it is affirmed, D&H has no objection to affirmance of the judgment below as to the *Merger* case. If the judgment below as to the *Inclusion* case is reversed,* the judgment below as to the *Merger* case should also be reversed and the matter remanded to the Commission for further proceedings as herein set forth.

Respectfully submitted,

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November 27, 1967

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* Other than on the appeal of B&M or the EL bondholders assuming, as prayed above, any remand based thereon is without prejudice to the right of EL and D&H to proceed to immediate enforcement of the Commission's provision for their inclusion.